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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MARK DUANE WALLACE,

Defendant and Appellant.

D059178

(Super. Ct. No. RIF153913)

APPEAL from a judgment of the Superior Court of Riverside County, Edward D. Webster, Judge. Affirmed as modified with directions.

A jury convicted Mark Wallace of the attempted murders of Riverside Police Officers Watkins and Bercian, assault with a deadly weapon on Officers Watkins, Bercian, Mann, Adcox, and Stewart, unlawful possession of an assault rifle, unlawful possession of a firearm by a felon, unlawful possession of a loaded firearm in public, and unlawful possession of ammunition. The jury also found true that in the attempted murders, Wallace personally and intentionally discharged a firearm, and in committing

the assaults, he personally used a firearm. The court found true that Wallace had two prior serious felony convictions for carjacking and assault on a peace officer.

Wallace appeals, contending: (1) he was denied due process because the trial court excluded relevant evidence; (2) the trial court erred in denying his motion to discover the personnel records of Officers Adcox and Mann under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*); (3) the trial court had a sua sponte duty to include language regarding antecedent threats in the jury instruction concerning self-defense (CALCRIM No. 505) and trial counsel provided ineffective assistance by not requesting that language; (4) the trial court erred in refusing his request to present evidence that a witness refused to testify; (5) cumulative error requires reversal; and (6) the sentences for assault with a firearm against Officers Watkins and Bercian should be stayed because the underlying conduct for those crimes was indivisible from the attempted murders.

We conclude that the sentences imposed for assault with a firearm against Officers Watkins and Bercian must be stayed pursuant to Penal Code section 654. We reject Wallace's remaining claims. Because there were no individual errors, there is no cumulative error and we need not address this claim.

## FACTUAL AND PROCEDURAL BACKGROUND

### *The People's Case*

On an evening in November 2009, Riverside Police Officers Watkins and Bercian learned during a pre-shift briefing that Wallace was wanted as a parolee-at-large and was considered armed and dangerous. They were also informed that Wallace was possibly in a black Honda with chrome rims and a sticker in the window. While on patrol, the

officers received information that Wallace may be coming into the area. They prepared themselves for a felony or "hot" stop by selecting and loading their weapons. Officer Watkins had a shotgun and Officer Bercian had an assault rifle.

Officers Watkins and Bercian saw a black Honda that matched the description they received earlier in the evening. Lisa Mitchell was driving the Honda and Wallace was in the passenger seat. Officers Watkins and Bercian followed the vehicle. After the officers observed a Vehicle Code violation, they attempted to pull the Honda over by activating their lights. When Mitchell stopped at a signal light, the officers propped open their doors and prepared themselves to get out and take Wallace into custody. However, when the light turned green, the Honda made a left turn and "took off." The officers activated their siren and Mitchell sped up. Several officers joined the pursuit. Officers Watkins and Bercian were in the lead, followed by Officers Adcox and Mann in a second patrol vehicle, and Officer Stewart in a third patrol vehicle.

Wallace fired shots at the pursuing officers through the back window of the Honda, breaking the windshield of the patrol vehicle occupied by Officers Watkins and Bercian. Officers Watkins and Bercian returned fire and Wallace continued to fire shots at them in rapid succession. The officers cautiously followed Wallace who was still shooting at them from the Honda. In total, Officers Watkins and Bercian fired 11 or 12 shots, and Wallace fired 42 shots. Officers Adcox and Mann did not fire any shots.

Eventually, the Honda turned onto a street that Officer Watkins recognized as a possible address for Wallace. Mitchell turned off the Honda's lights and "blacked out" the car. The patrol cars did the same and pulled over to the side of the road. The officers

got out of their vehicles and took cover nearby. Officer Watkins saw a male dressed in black, carrying what appeared to be a rifle, run into a house. Wallace locked himself in the house, turned off all the lights, and instructed Mitchell and another woman to put a mattress up against the windows. The standoff lasted approximately four hours before Wallace came out of the house and was taken into custody.

### *The Defense*

Wallace testified on his own behalf. He stated that before the shooting, he had conversations with Rudy Zaragoza, who he had known since he was a teenager, about the police. During those conversations, Zaragoza stated that police pulled him over and told him they were looking for and wanted to kill Wallace. Wallace claimed Zaragoza told him this approximately five times. The information made Wallace afraid of the police.

Wallace also claimed that he was afraid because of prior interactions he had with the police. In 2001, Wallace was involved in an incident during which police shot at him and several officers beat him. Wallace denied that he was shot at because he aimed a Chinese throwing star in the direction of an officer. He pleaded guilty, however, to assaulting a peace officer with a deadly weapon. While Wallace was in court related to that offense, an officer smiled at him and said, "We're going to get you, [Wallace]. We'll see you in eight years."

Wallace also stated that when he was a teenager, Riverside Sheriff's deputies took him behind a grocery store, handcuffed him and beat him up. He claimed there were numerous similar occasions involving officers. However, none of the prior incidents involved officers from the Riverside Police Department.

In regard to the November 2009 shooting, Wallace testified that Zaragoza asked him to bring guns to a certain location because rival gang members were threatening to harm Zaragoza. Mitchell obtained a bag full of guns from Zaragoza's truck and put it in the backseat of the Honda. Wallace checked the guns to make sure they were loaded. Although Wallace knew that police were looking for him and that he was not allowed to carry a gun as a convicted felon, he had a gun in his waistband.

As Mitchell drove, Wallace noticed police were following them. After the officers activated the lights on the patrol vehicle, Wallace saw the officer on the passenger side had his door open and his gun ready like he was going to kill Wallace at that moment. Wallace also saw that the other officer was armed. At that point, Wallace told Mitchell not to stop the car.

Wallace reached into the backseat, grabbed an assault rifle and fired at the officers hoping that they would back off. Wallace thought that he was going to be killed and that deadly force was necessary to allow him to escape. According to Wallace, he fired the rifle 25 or 26 times. Wallace admitted that he aimed for the windshield of the patrol vehicle and that he intended to kill the police officers.

After Mitchell stopped the car, Wallace ran into a house with the rifle in his hand and another weapon in his waistband. Wallace claimed that he went into the house because he did not want to be arrested by the officers in the pursuit. Instead, he wanted to surrender to "superior" officers. After a standoff, Wallace surrendered to the Riverside Sheriff's Department.

## DISCUSSION

### I. *Exclusion of Evidence*

Wallace contends the trial court denied him due process by excluding two areas of evidence that would have corroborated his testimony and supported his defense that Riverside officers wanted to harm him. The two areas of evidence included (1) prior contacts between Zaragoza and the police, and (2) evidence of an Internal Affairs investigation into the conduct of Officers Mann and Adcox.

#### A. Background

Prior to trial, the People moved to exclude evidence concerning an October 2009 stop of Zaragoza by Officers Mann and Adcox, testimony from Zaragoza, and any testimony about a subsequent investigation of the two officers. The prosecutor gave the following factual background regarding the evidence:

"In October of 2009, Officers Adcox and Mann pulled over [Zaragoza] and [Mitchell] while he's driving. During a search of the vehicle that was registered to [Mitchell], Officers Adcox and Mann said they found dope, and the occupants of the car did not believe there was dope in the car. However, they indicated multiple times they found dope, and that they were going to take—they were going to arrest [Mitchell] because the car was registered to her, as the dope was . . . found in the center console area.

"At that point in time [Zaragoza] fessed up and . . . said, 'Hey, don't take [Mitchell]. Don't arrest her. I will give you [Wallace],' who's a parolee at large. My understanding from reading reports, investigating the actual incident is that the officers, Adcox and Mann, set up a perimeter, other officers got involved to see if [Zaragoza] could get the defendant to come into the Riverside area.

"After a couple hours the perimeter was taken down, [Wallace] was never apprehended that day. [Zaragoza] and [Mitchell] . . . were let go. Sergeant Hutzler . . . told Officer Adcox and Mann to book the

dope into evidence as they had conveyed to several officers they found dope. That was the October incident.

"The night of our shooting Officers Adcox and Mann pulled over [Zaragoza]. They, again, found him with methamphetamine in his car. They indicated they were going to arrest him, at which point [Zaragoza] again volunteers, 'Hey, I can get you the defendant.' He calls [Mitchell], has a conversation with her saying he needs for [Mitchell] to come and get him, as well as to bring the defendant along. [Zaragoza] then tells the police, 'He's coming and he's coming in a black Honda with a Tinkerbelle sticker.'

"[Zaragoza] told the detectives investigating the shooting that Adcox and Mann had made a deal with him that if [Wallace] came into the city they weren't going to arrest him. Both Officers Adcox and Mann deny ever having made such a deal with [Zaragoza].

"The officers, Adcox and Mann, convey over the air to Officers Bercian and Watkins, 'Look out for this car. It may have [Wallace] in it,' at which point Adcox and Mann left [Zaragoza] in the care of another officer, along with the dope in the bag [Zaragoza] had had, and went to go see if they could apprehend [Wallace]. Bercian and Watkins ended up being the lead car, followed by Adcox and Mann, followed by Officer Stewart.

"When the shooting happened, the officer watching [Zaragoza] lets [Zaragoza] go with the drugs. We don't know whether he knew the drugs were in the bag or not. [Zaragoza] then shows up at the Twining Street residence where the defendant is barricaded about four hours later, and is found with the same drugs and taken in. But [Zaragoza] is never charged, arrested for having the methamphetamine on him that day.

"Following the shooting with Sergeant Hutzler, who was involved in investigating, he went back and looked at the prior October stop, and found that no evidence had been booked in, no dope had been booked in, and that no file number or report number was assigned the October traffic stop. Based on that, a criminal investigation began in which both officers invoked their Miranda rights, as well as an Internal Affairs investigation is pending, but has not yet been completed in any way, shape, or form."

Wallace argued that the evidence was relevant to demonstrating he acted in self-defense because the officers' conduct showed their intent to get him and that a reasonable inference was that the officers wanted to shoot and kill him. Wallace also claimed that Officers Adcox and Mann were on the "same team" as the officer that he assaulted in 2001 and that it was reasonable to infer that Officers Adcox and Mann wanted to attack him.

The court ruled that Wallace could call Officers Adcox and Mann to testify regarding their observations during the November 2009 shooting, but that any testimony concerning their contacts with Zaragoza before the shooting incident would be excluded under to Evidence Code section 352. (Undesignated statutory references are to the Evidence Code.) When the issue was raised again during trial, the court rejected Wallace's argument that evidence of corruption by Officers Mann and Adcox was admissible under section 1103, concluding that the prior acts of the officers did not "translate to a character for violence."

Lastly, during trial, defense counsel informed the court that he wanted to question Zaragoza's girlfriend, Angela Bogumill, regarding whether Zaragoza told her he was working with the police prior to the day of the shooting. The trial court stated that it would sustain the prosecution's hearsay objection. Defense counsel then requested permission to ask Bogumill about whether she saw Zaragoza talking to the police. The court concluded the evidence was not relevant to the shooting.



## B. Analysis

Only relevant evidence is admissible. (§§ 350, 351.) "Relevant evidence" is evidence having a tendency in reason to prove or disprove a disputed fact consequential to the determination of an action. (§ 210.) Evidence is relevant if it tends logically, naturally or by reasonable inference to establish or negate a material fact. (*People v. Cowan* (2010) 50 Cal.4th 401, 482; *People v. Kronemyer* (1987) 189 Cal.App.3d 314, 347.) "Evidence is irrelevant, however, if it leads only to speculative inferences." (*People v. Morrison* (2004) 34 Cal.4th 698, 711.) Further, relevant evidence may be excluded "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (§ 352.) Courts have wide discretion in determining whether evidence is relevant, and if so, whether it should be excluded under section 352. (*People v. Mobley* (1999) 72 Cal.App.4th 761, 792-793, overruled on other grounds in *People v. Trujillo* (2006) 40 Cal.4th 165, 181, fn. 3.) A trial court's exclusion of evidence pursuant to section 352 is reviewed for an abuse of discretion. (*Olson v. American Bankers Ins. Co.* (1994) 30 Cal.App.4th 816, 826.)

If there was an abuse of discretion, we must determine the proper standard under which to review the alleged error. Wallace argues the trial court's exclusion of evidence denied him his due process right to present his theory of self-defense and that we should apply the harmless error review applicable to constitutional errors. (See *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).) We reject this argument.

A trial court's erroneous exclusion of evidence that does not impinge upon a defendant's constitutional rights is reviewed under the standard of prejudice adopted in *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (*People v. Boyette* (2002) 29 Cal.4th 381, 429.) While a refusal to allow a defendant to present a defense infringes upon the defendant's constitutional rights and is subject to the stricter beyond a reasonable doubt standard set forth in *Chapman*, a rejection of only *some* evidence concerning the defense is reviewed under the *Watson* standard. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103 (*Fudge*).) Under *Watson*, the reviewing court must affirm the judgment if it is "not reasonably probable that a result more favorable to defendant would have been reached in the absence of the error . . . ." (*Watson, supra*, at p. 837.)

Here, if the trial court erred in excluding evidence, the alleged error did not rise to the level of constitutional error because Wallace was not denied the ability to present a defense. Exclusion of only some evidence concerning a defense is subject to the *Watson* standard of review and we will review the alleged error under that standard. (*Fudge, supra*, 7 Cal.4th at pp. 1102-1103.) We next consider the particular evidence that Wallace claims was improperly excluded.

1. Zaragoza's Prior Contacts with Officers Mann and Adcox

Wallace contends the excluded evidence regarding prior stops of Zaragoza by Officers Mann and Adcox would have corroborated his self-defense testimony by showing that the officers had the opportunity to convey a threat to Zaragoza, providing evidence that Officers Mann and Adcox had a greater desire to locate Wallace than was known to the jury, and providing the link necessary for the jury to conclude that Officers

Mann and Adcox discussed capturing Wallace with the other officers. While we find there is not a sufficient connection between the proffered evidence and all of Wallace's claims, we conclude the evidence was relevant to corroborate his testimony that Zaragoza conveyed threats by the officers to him. The exclusion of the evidence, however, was not prejudicial.

" 'A person claiming self-defense is required to "prove his own frame of mind," and in so doing is "entitled to corroborate his testimony that he was in fear for his life by proving the reasonableness of such fear." ' " (*People v. Minifie* (1996) 13 Cal.4th 1055, 1065 (*Minifie*)). " 'A defendant who testifies that he acted from fear of a clan united against him is entitled to corroborate that testimony with evidence "tend[ing] in reason to prove" that the fear was reasonable. [Citation.] Threats from the group on the defendant's life would certainly tend in reason to make the defendant fearful.' " (*Id.* at p. 1066.)

Here, Wallace testified that he feared for his life because Zaragoza told him that when police pulled Zaragoza over, the officers stated they were looking for and wanted to kill Wallace. Evidence regarding Zaragoza's prior contacts with Officers Mann and Adcox corroborated Wallace's claim that Zaragoza conveyed threats by those officers to him. The evidence would have supported Wallace's testimony by demonstrating that the officers were in prior contact with Zaragoza and had an opportunity to convey threats about Wallace to him. The trial court excluded the evidence pursuant to section 352. However, we find nothing in the record suggesting that the evidence would have necessitated an undue consumption of time or created a substantial danger of undue

prejudice, of confusing the issues, or of misleading the jury. (§ 352.) While we do not conclude that all of the proffered evidence should have been admitted, we find the trial court abused its discretion in excluding *all* evidence, other than Wallace's own testimony, of Zaragoza's prior contacts with Officers Mann and Adcox.

Having found an abuse of discretion, we must consider whether the error was prejudicial. In light of the overwhelming evidence supporting Wallace's conviction, we conclude the error was harmless. Wallace admitted that he fired the first shot at the officers following him and that he intended to kill them. Further, Wallace used more force than was reasonably necessary to escape the officers and surrender in a place of safety. " '[A]ny right of self defense is limited to the use of such force as is reasonable under the circumstances.' " (*Minifie, supra*, 13 Cal.4th at p. 1065.) Wallace fired 42 shots at the officers and aimed directly into their windshield. This excessive use of force exceeded the bounds of self-defense. We also reject Wallace's contention that the prosecutor's argument to the jury that there was no corroboration for Wallace's claim of self-defense " 'tips the scales' in favor of a finding prejudice." Viewing the record in its totality, there is no reasonable probability that Wallace would have obtained a more favorable result in the absence of the error. (*Watson, supra*, 46 Cal.2d at p. 837.)

## 2. Internal Affairs Investigation of Officers Mann and Adcox

Wallace next claims the Internal Affairs investigation of Officers Mann and Adcox was admissible under section 1103 to show their conduct was in conformity with their character and was probative to show the lengths that Riverside police officers would go to capture him. We disagree.

Section 1101, subdivision (a), generally precludes admission of evidence of a person's character when offered to prove his or her conduct on a specific occasion. Section 1103, subdivision (a)(1), provides an exception to that general rule and allows admission of character evidence in a criminal action when the evidence is offered to prove conduct of the victim in conformity with the victim's character. That provision has been construed as allowing a criminal defendant to support a claim of self-defense by presenting evidence of the victim's specific acts of violence and general reputation for violence. (*People v. Wright* (1985) 39 Cal.3d 576, 587.) However, evidence offered pursuant to section 1103 is subject to exclusion under sections 350 (providing only relevant evidence is admissible) and 352. (*In re Christian S.* (1994) 7 Cal.4th 768, 783.)

Here, Wallace claims he sought to introduce character evidence regarding the willingness of Riverside police officers Mann and Adcox to lie, failure to follow police regulations, and readiness to commit crimes to achieve their personal ends. Under the circumstances of this case, these character traits were not admissible under section 1103 as they did not pertain to any prior acts of violence by the officers or a general reputation for violence. Further, even if the Internal Affairs investigation revealed the character traits Wallace sought to introduce into evidence, it is an unreasonable stretch to say that a character trait for dishonesty or corruption translates to the officers' willingness to threaten bodily harm or death. Further, we fail to see how the evidence is relevant as the misconduct that is the subject of the investigation had nothing to do with the shooting in this case or Wallace's claim of self defense. Officers Mann and Adcox were only peripherally involved in the incident and did not fire any shots. It was the other officers

that started the pursuit and exchanged gun fire with Wallace. Thus, we conclude the trial court acted well within its discretion in excluding evidence of the Internal Affairs investigation.

## II. *Peace Officer Personnel Records*

Wallace argues the trial court erred in denying his motion to discover the personnel records of Officers Adcox and Mann. We disagree.

Law enforcement personnel records are presumptively confidential (Pen. Code, § 832.7); however, under some circumstances, the privacy interests supporting confidentiality conflict with a criminal defendant's equally compelling due process interest in obtaining evidence necessary to his defense. (*Fletcher v. Superior Court* (2002) 100 Cal.App.4th 386, 400.) To obtain discovery of these records, a defendant must file a written motion accompanied by an affidavit showing good cause for the discovery, explaining the materiality of the requested documents and stating "upon reasonable belief" that the governmental agency actually has them. (§ 1043, subds. (a), (b)(3).) "A showing of 'good cause' requires defendant to demonstrate the relevance of the requested information by providing a 'specific factual scenario' which establishes a 'plausible factual foundation' for the allegations of officer misconduct committed in connection with defendant." (*California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1020.) The allegations may be based on information and belief rather than personal knowledge; however, they must be stated with adequate specificity to preclude the possibility that the defendant is merely engaging in a fishing expedition. (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 85; *People v. Mooc* (2001)

26 Cal.4th 1216, 1226.) We review a trial court's *Pitchess* ruling under an abuse of discretion standard. (*People v. Memro* (1985) 38 Cal.3d 658, 684, overruled on other grounds in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2.)

Here, Wallace sought the personnel records of Officers Adcox and Mann concerning any actions involving fabrication of charges, dishonesty, excessive force and racial bias. In his declaration supporting the request, defense counsel stated that the district attorney informed him that Officers Mann and Adcox were "under investigation for their conduct in this case" and he believed the officers submitted a false police report or committed some unlawful act against Wallace. The declaration indicated that the information was necessary "due to the reason that the defense expects to demonstrate that the Officers[] have a character for dishonesty and/or a racially motivated bias and/or . . . admission(s) for untruthfulness." The trial court denied the motion, stating that "there was no declaration containing a plausible factual scenario within the meaning of the law . . . ." The court also noted that the declaration "is basically some generalized assertion that the defense believes that the officers may have engaged in some misconduct. No assertion as to what it is, how it relates to the facts of the case, [and] how that conduct would be material."

We conclude the trial court properly exercised its discretion in denying the motion because the declaration contained nothing more than general allegations of misconduct and failed to offer any theory as to how the evidence supported Wallace's defense. The declaration stated the information was necessary to show bias or dishonesty, but not how those showings support a defense or how the information would impeach the officers'

version of the shooting incident. "The defendant does not need to corroborate or show motivation for the alleged officer misconduct, but must provide ' "a plausible scenario . . . that might or could have occurred." [Citation.] A scenario is plausible when it asserts specific misconduct that is both internally consistent and supports the proposed defense.' " (*People v. Sanderson* (2010) 181 Cal.App.4th 1334, 1340.) Wallace did not present any scenario, much less a plausible one, and thus did not make the requisite showing to support discovery of the officers' personnel records.

We conclude that the trial court properly denied Wallace's *Pitchess* motion because the declaration did not set forth a specific factual scenario establishing a plausible factual foundation for the allegations of police dishonesty or other misconduct. (*California Highway Patrol v. Superior Court, supra*, 84 Cal.App.4th at p. 1020.)

### III. *Instruction on Antecedent Threats*

The trial court instructed the jury with a modified version of CALCRIM No. 505, explaining the circumstances under which it may conclude that a defendant acted in lawful self-defense. Defense counsel did not object to the instruction or request any modifications or additional self-defense instructions.

Wallace now claims that the trial court should have given and defense counsel should have requested the following two optional paragraphs in CALCRIM No. 505 regarding antecedent threats:

"[If you find that the defendant knew that [Riverside peace officers] had threatened or harmed others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.]



"[Someone who has been threatened or harmed by a person in the past, is justified in acting more quickly or taking greater self-defense measures against that person.]"

He asserts that the trial court should have sua sponte instructed the jury with these paragraphs and to the extent his claims have been forfeited by defense counsel's failure to object, he received ineffective assistance of counsel. We conclude Wallace forfeited the issue on appeal and the trial court did not have a sua sponte duty to instruct the jury with the optional paragraphs. (*People v. Lang* (1989) 49 Cal.3d 991, 1024 [failure to request clarifying or amplifying language results in forfeiture on appeal]; *People v. Garvin* (2003) 110 Cal.App.4th 484, 488-489 [trial court does not have sua sponte duty to instruct on antecedent threats].) Accordingly, we analyze Wallace's alternative argument that counsel's failure to request the additional language constituted ineffective assistance of counsel.

To prevail on a claim of ineffective assistance of counsel, the defendant must show that counsel's performance fell below a standard of reasonable competence, and that there is a reasonable probability the result would have been more favorable to the defense in the absence of counsel's deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688 (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.) A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. (*People v. Bolin* (1998) 18 Cal.4th 297, 333.) The claimed prejudice must be affirmatively proved; speculation as to the effect of counsel's errors or omissions is insufficient. (*In re Clark* (1993) 5 Cal.4th 750, 766.)

Even assuming Wallace established deficient performance by his counsel, he failed to show prejudice under the *Strickland* standard. There is no "reasonable probability" the jury would have reached a different result if the two optional CALCRIM No. 505 paragraphs were given. (*Strickland, supra*, 466 U.S. at p. 694.) The first paragraph Wallace claims should been given to the jury pertains to defendant's knowledge "that [Riverside peace officers] had threatened or harmed *others* in the past." Wallace has not pointed to and we have found no evidence in the record that he had knowledge of threats or harm by officers upon *others*. Rather, the evidence concerning threats or harm all pertained directly to Wallace. Thus, this paragraph was irrelevant to the facts of this case.

In regard to the second paragraph, defense counsel informed the jury of the same principle in closing argument by stating, "[Wallace] is allowed to take greater defense measures and act more quickly, and there's no duty to retreat." Further, the trial court informed the jurors that in considering whether Wallace's use of force was reasonable, they should "consider all the circumstances as they were known to and appeared to the defendant." In light of the given instructions, defense counsel's argument, and the overwhelming evidence supporting the convictions, there is no reasonable probability that the jury would have reached a different result if instructed with the additional paragraph. Thus, defense counsel did not provide ineffective assistance by failing to request the optional paragraphs in CALCRIM No. 505.

#### IV. *Evidence of Witness's Refusal to Testify*

Wallace argues the trial court erred in refusing his request to present evidence of Zaragoza's refusal to testify. We disagree.

Outside the presence of the jury, the trial court discussed Zaragoza's refusal to testify with defense counsel. Defense counsel inquired as to whether he could inform the jury that he attempted to get Zaragoza to testify, but Zaragoza refused. The court concluded that neither counsel would be allowed to argue why Zaragoza did not testify. The trial court later gave Zaragoza multiple opportunities to testify, but he refused. The court held Zaragoza in direct contempt and imposed a five-day sentence for his refusal to testify.

Relying on *People v. Lopez* (1999) 71 Cal.App.4th 1550 (*Lopez*) and *People v. Sisneros* (2009) 174 Cal.App.4th 142 (*Sisneros*), Wallace contends he was entitled to argue that a logical inference from Zaragoza's refusal to testify was that Zaragoza feared reprisal from law enforcement because his testimony "would have disclosed further police misconduct and corruption as indicated in the Internal Affairs documents." Wallace's reliance on *Lopez* and *Sisneros* is misplaced, and we reject his argument.

In *Lopez*, the prosecution wanted to call a witness to testify regarding defendant's conviction for a prior gang-related offense. (*Lopez, supra*, 71 Cal.App.4th at p. 1553.) Before taking the stand, the witness made it clear that he had no intention of testifying. (*Ibid.*) The trial court, however, ordered the witness to testify before the jury. (*Id.* at p. 1555.) The witness took the stand, refused to answer questions, and asserted a Fifth Amendment privilege, which he was not entitled to claim. (*Ibid.*) On appeal, the court

held "where a witness has no constitutional or statutory right to refuse to testify, . . . [j]urors are *entitled* to draw a negative inference when such a witness refuses to provide relevant testimony." (*Id.* at p. 1554.) Thus, the jurors in *Lopez* were entitled to consider the witness's improper claim of privilege to support gang expert testimony that gang members act as a unit to advance the cause of the gang. (*Id.* at pp. 1555-1556.)

Similarly, in *Sisneros*, the trial court permitted the prosecution to put a witness on the stand who previously indicated she would refuse to be sworn as a witness and answer questions. (*Sisneros, supra*, 174 Cal.App.4th at p. 149.) The trial court's decision was upheld on appeal on the basis that the witness's courtroom conduct supported gang expert testimony regarding witness intimidation. (*Id.* at p. 152.)

Here, unlike the situations in *Lopez* and *Sisneros*, after Zaragoza indicated his unwillingness to testify, Wallace never requested that Zaragoza be put on the stand so that the jury could observe his conduct. Rather, Wallace asked the court's preference in that regard and did not object when the court indicated that it preferred to simply not put Zaragoza on the stand. Thus, there was no conduct for the jury to observe from which they could have drawn a negative inference.

Further, the inference that Wallace wanted the jury to make from Zaragoza's refusal to testify was not admissible because it was speculative and not relevant to the charges against Wallace or his claim of self-defense. In *Lopez* and *Sisneros*, the witnesses' refusal to testify supported gang expert testimony regarding the conduct of gangs. Unlike those cases, Wallace wanted the jury to infer that the police engaged in "misconduct and corruption as indicated in the Internal Affairs documents." As we have

already discussed, allegations of misconduct or corruption do not translate to threats to kill Wallace. (See *ante*, Part I.B.2.) There was no evidence presented of the Internal Affairs investigation or police corruption stemming from prior traffic stops of Zaragoza. Thus, it would have been an unreasonable leap for the jury to infer that Zaragoza refused to testify out of fear of retaliation because he would have disclosed police misconduct.

In sum, we reject Wallace's claim that he was denied the benefit of a negative inference that the jury could have drawn from Zaragoza's refusal to testify.

#### V. *Alleged Sentencing Error*

Lastly, Wallace contends the sentences imposed on counts 3 and 4 for assault with a deadly weapon against Officers Watkins and Bercian should be stayed pursuant to Penal Code section 654 because the objective for those crimes was indivisible from his attempted murder convictions. We agree.

Penal Code section 654 prohibits the imposition of multiple sentences where a single act or course of conduct pursuant to a single objective violates more than one statute. In such a situation, a defendant may be punished for only the most serious offense. (*People v. Diaz* (1967) 66 Cal.2d 801, 806-807.) However, if the evidence discloses that a defendant entertained multiple criminal objectives independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were part of an otherwise indivisible course of conduct. (*People v. Centers* (1999) 73 Cal.App.4th 84, 98.) The principal inquiry in each case is whether the defendant's criminal intent and objective were single or multiple. (*People v. Beamon*

(1973) 8 Cal.3d 625, 639.) Whether the defendant held multiple criminal objectives is a question of fact for the trial court, and its finding will be upheld on appeal if there is any substantial evidence to support it. (*People v. Coleman* (1989) 48 Cal.3d 112, 162.)

Here, the same course of conduct supported the convictions for assault with a deadly weapon against Officers Watkins and Bercian and the attempted murders of those officers. Thus, we must determine whether Wallace had independent criminal objectives in committing the crimes. The Attorney General argues Wallace harbored multiple objectives, to escape and to kill the officers. While there may be two objectives, we find they are incidental to each other and cannot support imposition of concurrent sentences. The evidence in this case reveals that assault with a deadly weapon against Officers Watkins and Bercian was the means of perpetrating the crimes of attempted murder. In these circumstances, multiple punishment is barred by Penal Code section 654. (See *Neal v. State of California* (1960) 55 Cal.2d 11, 20 [holding that defendant who threw gasoline into a bedroom and ignited it could not be punished for both attempted murder and arson because the arson was the means used to commit the crime of attempted murder].) We conclude the sentences on counts 3 and 4 for assault with a deadly weapon against Officers Watkins and Bercian must be stayed.

## DISPOSITION

The sentences on counts 3 and 4 are stayed pursuant to Penal Code section 654.

The trial court is ordered to modify the abstract of judgment to reflect the stay and forward a corrected copy to the California Department of Corrections and Rehabilitation.

In all other respects, the judgment is affirmed.

MCINTYRE, J.

WE CONCUR:

McCONNELL, P. J.

BENKE, J.